

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Time Warner Cable Inc.) CSR 7776-E, 7783-E, 7784-E, 7785-E,
Petition for Determination of Effective) 7788-E
Competition in various Ohio Communities)

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 2008

Released: July 11, 2008

By the Associate Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioner alleges that its cable system serving the communities listed on Attachment B and hereinafter referred to as Group B Communities is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). Petitioner additionally claims to be exempt from cable rate regulation in the Communities listed on Attachment C and hereinafter referred to as Group C Communities because the Petitioner serves fewer than 30 percent of the households in the franchise area. The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules. The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

1See 47 U.S.C. § 543(a)(1).

247 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

347 C.F.R. § 76.906.

4See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

5See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;⁶ this test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁷

5. Turning to the first prong of this test, it is undisputed that these Group B Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁸ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.⁹ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Group B Communities to support their assertion that potential customers in the Group B Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹¹ and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹² Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Group B Communities because of their national satellite footprint.¹³ Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Group B Communities.¹⁴ Petitioner sought to determine the competing provider penetration in the Group B Communities by purchasing a subscriber

⁶47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷47 C.F.R. § 76.905(b)(2)(i).

⁸*See* Petition at 4.

⁹Mediacom Illinois LLC et al., *Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

¹⁰47 C.F.R. § 76.905(e)(2).

¹¹*See* 47 C.F.R. § 76.905(g). *See also* Petition at 5.

¹²*See* Petition at 5-6.

¹³*See* Petition at 6-7.

¹⁴*Id.*

tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Group B Communities on a zip code and zip code plus four basis where necessary.¹⁵

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁶ as reflected in Attachment B, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Group B Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Group B Communities.

8. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Group B Communities.

B. The Low Penetration Test

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.¹⁷ Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise area.

10. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment C, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Group C Communities. Therefore, the low penetration test is also satisfied as to the Group C Communities.

¹⁵Petition at 7.

¹⁶Petition at 7-8.

¹⁷47 U.S.C. § 543(l)(1)(A).

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **ARE GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy
Associate Chief, Media Bureau

¹⁸47 C.F.R. § 0.283.

ATTACHMENT A

CSR(s) 7776-E, 7783-E, 7784-E, 7785-E, 7788-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)
<u>CSR 7776-E</u>	
Bloom	OH1018
Clay	OH0999
Harrison	OH1021
Porter	OH0998
Valley	OH1019
Vernon	OH1017
Washington	OH1020
<u>CSR 7783-E</u>	
Black Creek	OH2409
Dublin	OH2411
Duchouquet	OH2445
	OH2438
Franklin	OH2408
Goshen	OH2399
Logan	OH2442
Mendon	OH1325
Moulton	OH2443
	OH2439
Noble	OH2440
Richland	OH2493
Rockford	OH1324
Stokes	OH1542
Union	OH2412
Wayne	OH2400
Waynesfiled	OH1543
Willshire	OH1548
Wren	OH2178
<u>CSR 7784-E</u>	
Adams	OH0670
Belle Valley	OH0114
Caldwell	OH0115
Cambridge City	OH0129
Cambridge Township	OH0669
Center	OH2537
Kimbolton	OH2547
Liberty	OH2548
Monroe	OH2539
Wheeling	OH2549
<u>CSR 7785-E</u>	
Butler	OH0382
Chickasaw	OH1729
Coldwater	OH0331

Cynthian	OH2492
Fort Loramie	OH0356
Franklin	OH2384
German	OH2629
Granville	OH1336
Hoaglin	OH2385
Hopewell	OH2386
Jackson	OH2746
Jefferson	OH0932
Kettersville	OH1730
Liberty	OH2388
Loramie	OH2619
Marion	OH2620
Mclean	OH2621
Montezuma	OH0391
New Bremen	OH0358
New Knoxville	OH2623
North Star	OH1739
Ohio City	OH1671
Osgood	OH1736
Patterson	OH2786
Ridge	OH2389
Russia	OH1737
St. Henry	OH0364
Union	OH2391
Van Buren	OH2776
Van Wert	OH0355
Versailles	OH0392
Wabash	OH2788
Wayne	OH2789
Yorkshire	OH1738

CSR 7788-E

Brown	OH1934
Canaan	OH1442
Darby	OH2128
Fairfield	OH2130
Jefferson	OH2129
Jerome	OH2132
Millcreek	OH2131
Monroe	OH2659
Norwich	OH2133
Pike	OH2660
Pleasant	OH2134
Washington	OH1933

ATTACHMENT B

CSR(s) 7776-E, 7783-E, 7784-E, 7785-E, 7788-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7776-E</u>				
Clay	OH0999	20.58%	1,516	312
Porter	OH0998	18.88%	3,871	731
Washington	OH1020	21.90%	2,362	517
<u>CSR 7783-E</u>				
Mendon	OH1325	33.58%	262	88
Rockford	OH1324	32.23%	453	146
Stokes	OH1542	22.92%	2,360	541
Waynesfield	OH1543	21.82%	307	67
Wren	OH2178	40.47%	84	34
<u>CSR 7784-E</u>				
Adams	OH0670	29.20%	719	210
Belle Valley	OH0114	28.84%	104	30
Caldwell	OH0115	28.41%	831	236
Cambridge City	OH0129	28.04%	4,924	1,381
Kimbolton	OH2547	58.05%	57	33
Liberty	OH2548	31.22%	410	128
<u>CSR 7785-E</u>				
Chickasaw	OH1729	22.79%	136	31
Coldwater	OH0331	17.23%	1,636	282
Cynthian	OH2492	22.83%	657	150
Fort Loramie	OH0356	19.79%	480	95
Franklin	OH2384	20.28%	932	189
Kettlersville	OH1730	30.32%	60	18

Marion	OH2620	22.07%	888	196
Montezuma	OH0391	22.53%	71	16
North Star	OH1739	45.45%	77	35
Ohio City	OH1671	40.77%	312	127
Osgood	OH1736	40.77%	103	42
Russia	OH1737	46.52%	197	87
St. Henry	OH0364	30.81%	727	224
Van Wert	OH0355	28.18%	4,556	1,284
Versailles	OH0392	40.15%	1,061	426
Yorkshire	OH1738	40.54%	37	15
<u>CSR 7788-E</u>				
Jerome	OH2132	29.24%	1,402	410
Pleasant	OH2134	16.00%	2,556	409

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT C

CSR(s) 7776-E, 7783-E, 7784-E, 7785-E, 7788-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
<u>CSR 7776-E</u>				
Bloom	OH1018	1,221	289	23.67%
Harrison	OH1021	1,677	115	6.86%
Valley	OH1019	1,031	194	18.82%
Vernon	OH1017	696	199	28.59%
<u>CSR 7783-E</u>				
Black Creek	OH2409	220	6	2.73%
Dublin	OH2411	812	8	0.99%
Duchoquet	OH2445 OH2438	5,629	579	10.29%
Franklin	OH2408	932	46	4.94%
Goshen	OH2399	187	34	18.18%
Logan	OH2442	429	62	14.45%
Moulton	OH2443 OH2439	592	5	0.84%
Noble	OH2440	499	6	1.20%
Richland	OH2493	2,036	10	0.49%
Union	OH2412	680	1	0.15%
Wayne	OH2400	589	3	0.51%
Willshire	OH1548	651	94	14.44%
<u>CSR 7784-E</u>				
Cambridge Township	OH0669	6,525	1,059	16.23%
Center	OH2537	709	154	21.72%
Monroe	OH2539	237	22	9.28%
Wheeling	OH2549	294	24	8.16%

CSR 7785-E

Butler	OH0382	2,246	105	4.67%
German	OH2629	1,366	13	0.95%
Granville	OH1336	1,201	64	5.33%
Hoaglin	OH2385	225	9	4.00%
Hopewell	OH2386	359	55	15.32%
Jackson	OH2746	1,238	89	7.19%
Jefferson	OH0932	5,309	575	10.83%
Liberty	OH2388	669	58	8.67%
Loramie	OH2619	805	102	12.67%
Mclean	OH2621	1,117	218	19.52%
New Bremen	OH0358	1,073	181	16.87%
New Knoxville	OH2623	348	11	3.16%
Patterson	OH2786	430	48	11.16%
Ridge	OH2389	1,215	42	3.46%
Union	OH2391	370	11	2.97%
Van Buren	OH2776	543	76	14.00%
Wabash	OH2788	306	26	8.50%
Wayne	OH2789	1,620	93	5.74%

CSR 7788-E

Brown	OH1934	692	192	27.75%
Canaan	OH1442	890	140	15.73%
Darby	OH2128	1,083	73	6.74%
Fairfield	OH2130	479	94	19.62%
Jefferson	OH2129	2,616	492	18.81%
Millcreek	OH2131	459	72	15.69%
Monroe	OH2659	600	65	10.83%
Norwich	OH2133	9,768	1,203	12.32%
Pike	OH2660	130	5	3.85%
Washington	OH1933	630	22	3.49%